THE LAW SCHOOL.

IN THE MOOT COURT.

Coram THAYER, J.

Bispham v. *Brown.*

THE opinion contains a sufficient statement of the facts.

The plaintiff sues in contract, *first*, on an oral agreement by which he undertook to do certain work for the defendant upon his request, and the defendant, in consideration thereof, was to do certain work for the plaintiff, — alleging performance by the plaintiff and a refusal to perform by the defendant; and, *second*, for work and labor. The answer to both counts is a general denial. At the trial, at the close of the plaintiff's testimony, the Court ruled that the action could not be maintained upon either count, and directed a verdict for the defendant. The case comes up on exceptions to these rulings.

It appears that the plaintiff and defendant orally agreed on April 5, 1882, that the plaintiff should convey to defendant two houses, and that the defendant, in consideration thereof, should pay the plaintiff $5,000 and give him a lease of a certain hall for five years. By April 10, the deed and lease were given, the money paid, and the agreement, so far, was fully executed.

But it further appears that on the same fifth of April, "after the above agreement was made, but during the same conversation, the defendant promised to put a hard-pine floor in the hall when the plaintiff should request it; and that the plaintiff promised to cement the cellars in the two houses when the defendant should request it." This agreement also was oral; and when the deed and lease were subsequently executed, it does not appear that anything was said about it. It was not inserted in those instruments or either of them. But, nevertheless, within a few days, on April 15, the defendant requested the plaintiff to do the cementing, and he did it; and soon afterwards when the plaintiff called on the defendant to lay the floor in the hall, the defendant appears to have made no other objection to doing it than that he wished first to know for what use the plaintiff intended to let the hall.

The situation, then, was this: The parties orally agreed to make reciprocal written transfers of property. During the same conversation, but afterwards, they mutually agreed to do, each upon the request of the other, certain things to the property thus to be transferred. These agreements might, naturally and properly enough, have been inserted in the deed and lease; but they were not so inserted. They were not agreements which the law requires to be in writing; and they were not inconsistent with anything contained in either of the two instruments above named. That the parties, in executing these papers and omitting the oral agreements, meant no waiver or abandonment of them, is plainly indicated by the fact that, within a few days after the execution of the documents, one party called on the other to perform his part of it, and the latter complied; and this conclusion is supported

also by the defendant's reply, when he was in turn called upon soon afterwards to perform his part. The written conveyance and lease appear then to have been made, not for the purpose of reducing the previous oral agreements to writing, but in order to partly excuse those agreements.

The defendant, nevertheless, contends that the plaintiff, although he has performed his part of the oral agreement, cannot maintain this action against the defendant for refusing to perform it on his side. In sustaining this contention, the Court below adopted the defendant's request for a ruling, and held that "no verbal agreement between the parties to a written contract and made before or at the time of the execution of such contract are admissible to vary its terms or affect its construction." This ruling, and the general principle which it invokes, seem to be inapplicable to the facts of this case. The plaintiff is not seeking to fix upon the writings here any disputed interpretation or construction; no question of that sort arises. Nor is he seeking to vary or add to the terms of the writings, in the sense of reading into them and making operative as if it were a part of them, that which is not therein expressed. The bill of exceptions does not find any covenant or agreement in either the deed or lease; and we cannot assume that there was any other contract in either of them than such as is implied by law from the ordinary terms of such instruments. The oral agreements are in no way inconsistent with anything implied or expressed in the writings. They leave them to their full operation, and only set up other and distinct matter relating to the property granted and conveyed, in a case where it plainly appears that the parties did not intend the writings to be the full expression of all their previous contracts relating to the property in question. There is no authority for the doctrine that a written agreement is exclusively taken to merge all previous and contemporary oral contracts relating to the same subject-matter, even such as are not inconsistent with the writing; while in general this will be presumed as regards all such terms as would naturally and properly be inserted in the writings (and clear evidence will be required of the contrary), yet it is open to inquiry whether the fact be so or not. The question is one for the Court; and in determining it, there is no rule which limits the evidence to the contents of the writing itself. The doctrine, as regards this point, of such cases as *Naumberg* v. *Young*, 15 Vroom, 331, and *Hei* v. *Hiller*, 53 Wis. 415, is not well sustained. The point is to be determined in the same manner as the questions whether the parties really have reduced the contract to writing or not, and whether they have adopted the writing as binding, — matters upon which the mere signature is never conclusive and all evidence ordinarily receivable is admissible. *Buzzell* v. *Willard*, 44 Vt. 44; *Jones* v. *Hardesty*, 10 Gill & Johnson, 404, 416; *Ludeke* v. *Sutherland*, 87 Ill. 481; *Linau* v. *Smart*, 11 Humph. 308; *Preble* v. *Baldwin*, 6 Cush. 549; *Chapin* v. *Dobson*, 78 N.Y. 74; *Morgan* v. *Griffith*, L.R. 6 Ex. 70; *McCormick* v. *Cheevers*, 124 Mass. 262; *Graffam* v. *Pierce*, 143 Mass. 386. The case of *Eighmie* v. *Taylor*, 98 N.Y. 288, does not lay down a different doctrine. In *Angell* v. *Duke*, 32 L.T. Rep. N.S. 320, the case went upon the point of fact that the parties intended the lease to contain their full agreement.

Even if the plaintiff could not recover upon the express contract, as it is now held that he can, he would yet have a good cause of action on the second count, for work and labor. His contention under this head seems well sustained by the cases cited in the second division of his brief.

Exceptions sustained.

CLUB COURTS.

SUPERIOR COURT OF THE POW-WOW.

Defendant's grantor covenanted for himself, his assigns, etc., that when he or they should use a certain party-wall to be erected partly on plaintiff's land, he or they would pay to plaintiff's grantor, his assigns, etc., one half the cost of said wall. In order that the plaintiff may succeed in this action it must appear that the right to sue has passed to the plaintiff, and that the liability to be sued has passed to the defendant.

This is clearly not a covenant running with the land in equity, for such covenants are agreements not to do something; the proper remedy for the breach of which is an injunction. Is this, then, such a covenant as would run with the land at law? Where the relation of landlord and tenant exists, the liability of the parties is regulated by statute, and both the benefit and the burden of such covenants run with the land (32 Henry VIII. c. 34). This relation did not exist here, and it is tolerably well settled in England that in such a case the burden of the covenant does not run (Smith's Lead. Cas. 8th Eng. ed. 103).

Under some circumstances, however, the benefit of the covenant may run if the parties intend that it shall. If it relates to a thing not *in esse*, the word "assigns" must be expressly mentioned; furthermore, the covenant must "touch the use or enjoyment of the land;" *i.e.*, it must be of use to the covenantee as owner of the land with which it runs.

Now, this is a covenant to pay money to the first builder, his assigns, etc. It cannot be said to benefit him as owner of any lot of land. It must be distinguished from a covenant to dig a ditch, for example, upon a lot of land the performance of which would benefit the covenantee or his assignee only if he were the owner of the lot.

Upon the English view, therefore, neither the benefit nor the burden of this covenant runs.

The American cases generally make the question turn on whether there is privity of estate between covenantor and covenantee. As the term "privity" is loosely used, it has led to great confusion. The most satisfactory result is reached by the New York courts, which define privity as meaning the relation of landlord and tenant. *Coles* v. *Hughes*, 54 N.Y. 444; see also 90 N.Y. 663.

In Massachusetts another view of privity obtains. "The same privity that exists between lessor and lessee exists between grantor and grantee where grant is made of any subordinate interest in land." *Morse* v. *Aldrich*, 19 Pick. 449. In this view there is privity where an easement has been created, and a recovery would be allowed in the present case. *Savage* v. *Mason*, 3 Cush. 500.

The Court is of opinion that the defendant is not liable, on the grounds that there is no tenure, and that the covenant cannot be said to be beneficial to the plaintiff as holder of the land.